IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ENERGY AUTOMATION SYSTEMS, INC.,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION NO. 3-06-1079**
XCENTRIC VENTURES, LLC, d/b/a BADBUSINESS BUREAU and/or BADBUSINESSBUREAU.COM and/or RIP-OFF REPORT and/or RIPOFFREPORT.COM, and EDWARD MAGEDSON a/k/a ED MAGEDSON,	)	**Judge Trauger** **Magistrate Judge Griffin** **JURY DEMAND**
Defendants.	)	

INITIAL CASE MANAGEMENT ORDER

Pursuant to Local Rule 16(d)(2), Plaintiff, Energy Automation Systems, Inc. ("EASI"), and Defendant, Xcentric Ventures, LLC, d/b/a Badbusiness Bureau and/or badbusinessbureau.com and/or Rip-Off Report and/or ripoffreport.com ("Xcentric"), jointly submit this Initial Case Management Order.

I. Service and Jurisdiction

a. Service of process

Defendant Xcentric has been served with process. EASI has been unable to serve defendant Edward Magedson a/k/a Ed Magedson ("Magedson"). On June 20, 2007, the Court ordered Maria Speth, lead counsel for Xcentric, to furnish to counsel for EASI by 5:00 p.m. CST on June 21, 2007, the address at which Magedson may be served with process in this case. (Doc. No. 51.) On June 21, 2007, Counsel for Xcentric responded to the Order and EASI's motion.

Dockets.Justia.com

(See Docket 52) In that response Counsel stated that permission had been given by Mr. Magdeson for Counsel to accept service on his behalf for purposes of this action only.

b. Jurisdiction

EASI asserts that jurisdiction is proper under 28 U.S.C. ' 1331 and 28 U.S.C. § 1332 and that venue is proper under 28 U.S.C. § 1391(a) as to all Defendants. Defendant Xcentric contends that it is not subject to personal jurisdiction in this district and filed a Motion to Dismiss for Lack of Personal Jurisdiction. On May 25, 2007, the Court denied Xcentric's Motion. To the extent the Motion to Dismiss addressed the merits of the case, the Court converted the motion to a motion for summary judgment**.**

II. Theories of the Case, Claims and Defenses

a. Plaintiff

Plaintiff EASI is engaged in the distribution of equipment that reduces the volume of electricity consumed by electric motors, lighting equipment, air conditioning and refrigeration equipment, and other machinery and equipment powered by electricity. While EASI engages in some direct sales to end-users, EASI sells the majority of its products through a network of authorized resellers.

Defendants operate a website identified by and located through either of two domain names, ripoffreport.com and badbusinessbureau.com (the "Website"). The Website purports to expose companies and individuals who "ripoff" consumers. The Website contains numerous false and deceptively misleading statements about EASI, its dealerships and its officers and employees, including statements that EASI is a "complete" and "long running" "scam," a "damn scam ripoff business from hell," a business engaged in "fraud," and describes EASI's Chief Executive Officer as a "consumer fraud ripoff artist con man."

Unlike operators of a passive internet bulletin board, Defendants take an active role in creating and/or developing defamatory content on the Website about EASI. Defendants list EASI on the Website's "Top Rip-Off Links," featured on the Website's homepage. Defendants have created and/or listed various "Categories and Topics" by which targeted companies and individuals are organized on the Website, including the categories "Corrupt Companies" and "Con Artists." Upon information and belief, Defendants have also developed and/or created on the Website titles, various headings, and/or editorial messages concerning individuals and/or companies targeted by the reports. Despite repeated requests to remove the defamatory and misleading content from the Website, Defendant Magedson demanded payment for remedying the falsities pursuant to the "Rip-off Report Corporate Advocacy Business Remediation & Customer Satisfaction Program" offered on the Website.

Defendants' conduct has caused EASI to lose at least two dealership sales, which individually sell for approximately $40,000.00, and has damaged EASI's business and reputation. EASI alleges that Defendants' conduct constitutes common law defamation, interference with business relations and civil conspiracy, and violates the Tennessee Consumer Protection Act, T.C.A. §§ 47-18-101 et seq. EASI seeks preliminary and permanent injunctive relief requiring Defendants to remove from the Website any false and defamatory statements concerning EASI, its dealerships, or its employees, and prohibiting Defendants from later publishing such statements on the Website. EASI further seeks compensatory, punitive and treble damages, as well as attorneys' fees, costs and such other and further general relief which may be appropriate.

b. Defendant Xcentric

Examination of Plaintiff's Amended Complaint as presently set forth indicates that there are two different issues involved in this dispute—one legal, one factual—both of which demonstrate that Plaintiff's claims are fatally flawed. The following comments are made regarding the Amended Complaint, and thus are made without waiving any rights the Defendant has to challenge the Court's jurisdiction.

Legally, to the extent that Plaintiff seeks to impose liability upon Xcentric for statements authored by a third party, all claims are barred by the Communication Decency Act; 47 U.S.C. § 230 (the "CDA"). The CDA, expressly prohibits civil actions that treat an interactive computer service as the "publisher or speaker" of messages transmitted over its service by third parties. *See generally Doe v. America Online, Inc.*, 783 So.2d 1010 (Fl. 2001). This federal statute, which was passed by Congress with the desire to "promote unfettered speech," provides in relevant part that:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1). Section 230 further provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Green v. America Online,* 318 F.3d 465, 470 (3rd Cir. 2003) (noting that the CDA, "'precludes courts from entertaining claims that would place a computer service provider in a publisher's role,' and therefore bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions - such as deciding whether to publish, withdraw, postpone, or alter content.'").

The operation of an internet web site which allows access by multiple users is an activity which is unequivocally protected by the CDA. *See Carafano v. Metrosplash.com, Inc. 339 F.3d 1119* (9th Cir. 2003); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash.App. 2001). Indeed, every federal court that has considered the issue has held that the CDA immunizes a web site operator for defamatory material it publishes if it is not the creator of the content at issue. *See generally Batzel v. Smith*, 333 F.3d 1018, 1027–28 (9th Cir. 2003) (recognizing, "Making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet. Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.") (quoting *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 983–84 (10th Cir. 2000).

An outstanding analysis of the CDA is set forth in the California Supreme Court's recent opinion in *Barrett v. Rosenthal*, --- Cal.Rptr.3d ----, 2006 WL 3346218 (Cal. Nov. 20, 2006). In fact, as the *Barrett* Court recognized, the CDA has been universally interpreted as providing immunity to interactive websites for content created by a third party. *See Barrett*, 2006 WL 3346218, *18 note 18; (citing *Blumenthal v. Drudge*, 992 F.Supp. 44, 51 (D.D.C. 1998); *Ben Ezra, Weinstein, and Co., Inc. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Morrison v. America Online, Inc.*, 153 F.Supp.2d 930, 933-934 (N.D.Ind. 2001); *PatentWizard, Inc. v. Kinko's, Inc.* 163 F.Supp.2d 1069, 1071 (D.S.D. 2001); *Green v. America Online*, 318 F.3d 465, 470-471 (3rd Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-1124 (9th Cir. 2003); *Doe One v. Oliver*, 755 A.2d 1000, 1003-1004 (Conn.Super.Ct. 2000); *Doe v. America Online, Inc.*, 783 So.2d 1010, 1013-1017 (Fla. 2001); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40-42 (Wn.App. 2001); *Barrett v. Fonorow* 799 N.E.2d 916, 923-925 (Ill.App.Ct. 2003); *Donato v. Moldow* 865 A.2d 711, 720-727 (N.J. Super.Ct.App.Div. 2005); *Austin v. CrystalTech Web Hosting*, 125 P.3d 389, 392-394 (Ariz.App. 2005)).

Secondary authority has also explained that:

> [The CDA's] provisions set up a complete shield from a defamation suit for an online service provider, absent an affirmative showing that the service was the actual author of the defamatory content. Accordingly, a number of courts have ruled that the ISP was immune from liability for defamation where allegedly libelous statements were made available by third parties through an ISP or were posted by third parties on the server's billboards, as the ISP fell within the scope of 47 U.S.C.A. § 230.

Jay M. Zitter, J.D., Annotation—*Liability of Internet Service Provider for Internet or E–mail Defamation* § 2, 84 A.L.R.5th 169 (2000) (emphasis added) (citing Pantazis, Note, *Zeran v America Online, Inc.: Insulating Internet Service Providers From Defamation Liability*, 34 Wake Forest L. Rev. 531 (1999)); *see also Batzel v. Smith*, 333 F.3d 1018, 1027–28 (9th Cir. 2003) (recognizing, "Making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet. Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.") (quoting *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 983–84 (10th Cir. 2000).

Thus, as a matter of law, the CDA prohibits Plaintiff's claims to the extent that they seek to impose liability upon Xcentric for statements authored by a third party.

Factually, it appears that Plaintiff fully understands that the CDA prohibits liability for publication of third party speech, and for that reason it has attempted to avoid this problem by alleging without factual support that Xcentric actually authored/created some part of the material at issue in this case. This allegation is provably untrue. In fact, Xcentric is currently in possession of detailed emails from the principal of Plaintiff admitting that Plaintiff knew, prior to commencing this action, that all allegedly defamatory material was authored solely and exclusively by a third party.

For this reason, a factual matter, Plaintiff's claims regarding Xcentric's authorship of defamatory content in this matter are demonstrably false and direct violations of the prohibition set forth in Fed. R. Civ. P. 11 against baseless litigation. For this reason, upon dismissal of this action, Defendant intends to seek sanctions pursuant to Rule 11 against Plaintiff as well as any other remedies permitted by law.

c. Defendant Magedson

Defendant Magedson's theory of the case is unknown at this time.

III. Target Trial Date and Length

The Parties anticipate that this case should be ready for trial by November 2008. The Parties have calculated this date as more than 90 days from the final deadline for briefs on dispositive motions. The Parties estimate that the trial of this case will last approximately five (5) days.

IV. Issues

The issues in dispute in Plaintiff's Amended Complaint as presently set forth are (i) whether Defendants have defamed EASI, (ii) whether Defendants have violated the Tennessee Consumer Protection Act, T.C.A. §§ 47-18-101 et seq., (iii) whether Defendants have engaged in tortious interference with EASI's business relations, (iv) whether Defendants have engaged in a civil conspiracy to use coercion to obtain EASI's property and to develop, create and/or publish defamatory statements regarding EASI, and (v) whether EASI is entitled to compensatory damages, punitive damages, treble damages, attorney's fees and costs, preliminary and permanent injunctive relief, and any other general relief which may be appropriate. Defendant Xcentric reserves the right to raise additional issues in whatever response it may make to the Plaintiff's Amended Complaint.

V. Witnesses

a. Witnesses known by the Plaintiff at the present time:

i. Joseph C. Merlo
Energy Automation Systems, Inc.
145 Anderson Lane
Hendersonville, TN 37075

ii. Dr. Paul B. Bleiweis
Energy Automation Systems, Inc.
145 Anderson Lane
Hendersonville, TN 37075

iii. David Wiggins
218 Spy Glass Way
Hendersonville, TN 37075

iv. Cecil Benson
212 Parrish Place
Mt. Juliet, TN 37122

v. Edward Magedson
Address unknown

vi. Jeff LeJune
Address unknown

vii. Paulette Griffith
Address unknown

viii. Kim Jordan
Address unknown

ix. G. Young
Address unknown

x. Jackie Wynne
Address unknown

xi. Amy Thompson
Address unknown

xii. Lynda Craven
Address unknown

xiii. Heather Dorton
Address unknown

xiv. Kim Smith
Address unknown

b. Witnesses known by Defendant Xcentric at the present time:

Any/all witnesses listed by Plaintiff.

The Author(s) of the reports at issue.

c. Witnesses known by Defendant Magedson at the present time:

Defendant Magedson's list of potential witnesses is unknown at this time.

VI. Additional Claims or Parties

At this time, the Parties have no reason to believe that there will be additional counterclaims, cross-claims, third-party claims, joinder of parties and/or claims, or class action certification, nor are there any pending issues arising under Federal Rules of Civil Procedure 13-15, 17-21, or 23. As discovery progresses, there is the possibility that the Parties would need to add parties or claims. Any motion to amend the pleadings or join parties shall be filed in sufficient time to permit any discovery necessary because of the proposed amendment to be obtained within the deadlines set forth herein.

Defendant Xcentric intends to seek sanctions in this matter pursuant to Fed. R. Civ. P. 11 as explained above.

VII. Dispositive Motions

The deadline for filing dispositive motions is June 25, 2008. The deadline for filing responses shall be 30 days after the motion is served. The deadline for filing replies shall be 14 days after the response is served. Principal and response dispositive briefs shall not exceed 25 pages, absent leave of Court. Reply briefs shall be limited to 5 pages, absent leave of Court.

VIII. Discovery Deadlines

a. Initial Disclosures: The Parties shall exchange initial disclosures, pursuant to Federal Rule of Civil Procedure 26(a)(1), on or before July 25, 2007.

b. Non-Expert Discovery: The Parties shall complete all written discovery and depose all fact witnesses on or before February 15, 2008.

c. **Expert Discovery:** The Party with the burden of proof as to a claim or defense shall provide its expert witness designations and reports no later than March 17, 2008. The opposing Parties shall provide the Party bearing the burden of proof its expert witness designations and reports no later than April 17, 2008. Any rebuttal experts shall be provided by May 19, 2008. All expert witness depositions shall be completed by and expert discovery shall close on June 6, 2008. No expert shall testify or otherwise provide evidence at trial unless the deadlines set forth in this paragraph have been met with respect to that expert.

d. **Discovery-Related Motions:** The Parties shall file all discovery-related motions related to fact discovery on or before February 29, 2008 and all discovery-related motions concerning expert discovery on or before June 18, 2008. No motions concerning discovery are to be filed until after the Parties have conferred in good faith and, unable to resolve their differences, have prepared a joint written statement, pursuant to Local Rule 37.01(a) to be attached to the motion.

IX. Discovery Stays and Limitations

At this time, the Parties do not believe there should be a need for any stays or limitations on discovery.

X. Other Papers

At this time, the Parties are unaware of any other papers or case management status reports that will be filed.

XI. Alternative Dispute Resolution

The Parties do not believe that a mediation or settlement conference would be beneficial at this time but reserve the right to request such activities in the future if it appears to be beneficial in the handling of this matter.

XII. Other Hearings

At this time, the Parties are unaware of a need for any additional hearings before the case management judge.

XIII. Other Case Management Conferences

At this time, the Parties are unaware of any need for subsequent case management conferences.

So ORDERED this ____ day of ________________, 2007.

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ALETA TRAUGER
United States District Court Judge

APPROVED FOR ENTRY BY:

__s/Timothy L. Warnock_____________
Timothy L. Warnock
John R. Jacobson
William L. Campbell, Jr.
W. Russell Taber, III
Bowen Riley Warnock & Jacobson, PLC
1906 West End Avenue
Nashville, Tennessee 37203
(615) 320-3700

Attorneys for Plaintiff

__s/William J. Shreffler______________
James A. Freeman, III
William J. Shreffler
James A. Freeman & Associates, P.C.
P O Box 40222
2804 Columbine Place
Nashville, TN 37204
(615) 383-3787

s/Maria Crimi Speth
Maria Crimi Speth
JABURG & WILK PC
3200 North Central Avenue
Suite 2000
Phoenix, Arizona 85012
(602)248-1000

Attorneys for Defendant Xcentric Ventures, LLC